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No. 92-41

In The

Supreme Court of the United States

October Term, 1992

ARBY'S, INC. and FRED BARTLIFF,

Petitioners,

vs.

KITCHENS FOODS, INC., et al,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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45

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
STATEMENT OF THE CASE 1
A. Preservation of Constitutional Challenges 1
B. Statement of the Facts 1
SUMMARY OF ARGUMENT 4
REASONS FOR DENYING THE PETITION 7
I. RETROACTIVITY/DUE PROCESS ARGUMENT 7
A. Petitioners Failed to Preserve Their Retroactivity/Due Process Argument 7
B. Petitioners Have Not Suffered a Retroactive Imposition of Punitive Damages 11
1. Intentionally false opinions have been actionable in Alabama for over a century 12
2. The jury verdict was not based solely on claims for misrepresentation of opinion 16
3. Petitioners knew in 1985 that their actions were unlawful and could subject them to liability 17
II. POST-VERDICT REVIEW OF PUNITIVE DAMAGES AWARD 20
A. Petitioners Failed to Request a Post-Verdict Review of the "Reasonableness" of the Punitive Damages Award 20
B. Petitioners Presented no Evidence that the Punitive Damages Award was Excessive ... 24
C. The Lack of a Post-Verdict Review of the "Reasonableness" of the Punitive Damages Award Does Not Warrant Review By This Court 28
CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Associates Financial Services Co. of Alabama, Inc. v. Barbour, 592 So. 2d 191 (Ala. 1991) 27

Bankers Life and Casualty v. Crenshaw, 486 U.S. 71 (1988) 7, 23

Bradfield v. Elyton Land Co., 93 Ala. 527, 8 So. 383 (1890) 13

Dewey v. Des Moines, 173 U.S. 193, 43 L. Ed. 665, 19 S. Ct. 379 (1899) 23

Fraser v. Reynolds, 588 So. 2d 442 (Ala. 1990) 9, 10

Fuller v. Preferred Risk Life Insurance Co., 577 So. 2d 878 (Ala. 1991) 25, 26

Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989) .25, 26

Griel v. Lomax, 89 Ala. 420, 6 So. 741 (1889) 13

Illinois v. Gates, 462 U.S. 213 (1983) 24

Industrial Chemical & Fiberglass Corp. v. Chandler, 547 So. 2d 812 (Ala. 1988) 26

Keller v. Security Federal Savings & Loan Association, 555 So. 2d 151 (Ala. 1989) 9, 10

Kentucky v. Stincer, 482 U.S. 730 (1987) 7

McDowell v. Key, 557 So. 2d 1243 (Ala. 1990) 24, 27

Miller v. Florida, 482 U.S. 423 (1987) 20

Montgomery Southern Railway Co. v. Matthews, 77 Ala. 357 (1884) 12, 13, 19

TABLE OF AUTHORITIES – Continued

Page

Pacific Mutual Life Insurance Co. v. Haslip, 111 S. Ct. 1032 (1991) 21, 22

Patrick v. Burget, 486 U.S. 94 (1988) 7

Randell v. Banzhoff, 375 So. 2d 445 (Ala. 1979) 14

Reynolds v. Mitchell, 529 So. 2d 227 (Ala. 1988) .. *passim*

Ringer v. First National Bank, 291 Ala. 364, 281 So. 2d 261 (1973) 14

Rodopoulos v. Sam Piki Enterprises, Inc., 570 So. 2d 661 (Ala. 1990) 9, 10

Scholz Homes, Inc. v. Hooper, 287 Ala. 628, 254 So. 2d 328 (1971) 14

Shepherd v. Kendrick, 236 Ala. 289, 181 So. 782 (1938) 13, 14, 15

Stephens v. Hill, 249 Ala. 299, 31 So. 2d 136 (1947) 14

Tillis v. Smith Sons Lumber Co., 188 Ala. 122, 65 So. 1015 (1914) 14

MISCELLANEOUS

11th Cir. R. 36-1 4

Sup. Ct. R. 10 6

37 Am. Jur. 2d, *Fraud and Deceit* § 53 (1968) 19

STATEMENT OF THE CASE

A. Preservation of Constitutional Challenges

In their petition for writ of certiorari, Petitioners assert matter-of-factly:

> At all stages of the proceedings below, Petitioners asserted that the imposition of punitive damages has violated due process. Petitioners consistently maintained a due process objection to any award of punitive damages before both the District Court and the Court of Appeals. . . . Thus, both of the questions presented in this Petition are properly before the Court.

[Pet. for Cert. at pp. 4-5.] These statements are extremely misleading. Respondents do not contend that Petitioners failed to raise "a due process objection" in the courts below. However, as more fully explained *infra*, Petitioners have not timely pressed the particular due process issues asserted in their petition, and those issues were not passed upon by the courts below. Consequently, both of the questions presented in the petition for writ of certiorari are *not* properly before the Court.

B. Statement of the Facts

Petitioners misstate several facts and omit other material facts in their petition. Petitioners present the facts as if there were no claims submitted to the jury other than the claim based on projections of future sales and profits. Petitioners flatly state: "Respondents tried their fraud claim in the District Court *solely* on the basis of Bartliff's alleged projections concerning future sales and profits at a hypothetical restaurant. . . . " [Pet. for Cert. at p. 5.] This statement is patently false. In addition to the claim based on projections, Respondents asserted

(and proved) claims for misrepresentation of existing fact[1] and fraudulent suppression.

Furthermore, Petitioners misleadingly assert that "Respondents' fraudulent suppression claim cannot support the verdict because Respondents' admissions at trial plainly establish that any 'suppression' claim was time-barred." [Pet. for Cert. at p. 5 n. 2.] Remarkably, Petitioners fail to note that the jury specifically found Petitioners guilty of fraudulent suppression and *specifically found that this claim was not time-barred*. The interrogatories to the jury include the following specific findings:

> II.(A) Have the plaintiffs established by a preponderance of the evidence that the defendants fraudulently suppressed information defendants had a duty to disclose?
>
> ANSWER: (x) Yes (___) No
>
> * * *
>
> IV. Have the plaintiffs established by a preponderance of the evidence that they were not aware of facts which would have led a reasonably prudent person to have discovered such fraudulently suppressed facts the defendant had a duty to disclose on or before July 28, 1986?
>
> ANSWER: (x) Yes (___) No

[Pet. for Cert. at pp. 5a-6a.]

---

[1] Petitioners misrepresented to the Kitchens that the average annual sales of Arby's franchises were between $750,000.00 and $1,000,000.00, when the actual average annual sales were only between $500,000 and $600,000. (App. at 4a).

Petitioners misstate the facts for the purpose of "setting up" their retroactivity/due process argument. However, Petitioners' retroactivity/due process issue does not arise (and cannot be presented) under the correct facts because the jury's award of punitive damages is fully and independently supported by the jury's verdict on the fraudulent suppression claim, a cause of action which Petitioners cannot dispute existed under Alabama law in 1985.

Additionally, Petitioners fail to note that the jury found Petitioners guilty of *intentional* fraud and deceit.[2] Petitioners present their case as though they simply made "honest" guesses or projections to the Respondents. However, Respondents proved by clear and convincing evidence that Petitioners deliberately lied to Respondents (and to at least four other former Arby's franchisees who testified at trial) and intentionally and fraudulently induced Respondents to make substantial financial investments in an Arby's franchise by providing Respondents with blatantly false financial information.

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[2] Under Alabama law, punitive damages may be imposed for false representations in the form of an opinion only where the evidence establishes that the defendant stated the false opinions with an intent to deceive. *Reynolds v. Mitchell*, 529 So. 2d 227, 231 (Ala. 1988).

SUMMARY OF ARGUMENT

Petitioners propose to raise substantial constitutional challenges to the Eleventh Circuit's Rule 36-1 "no opinion" affirmance of the jury's verdict.[3] Petitioners premise their due process challenges upon assertions of fact which are completely at odds with the evidence of record in this case and well-established Alabama law. Moreover, Petitioners at no time effectively raised or pressed these issues in the courts below. Consequently, neither of the courts below considered these issues. Due to the absence of a properly developed record, there is nothing for this Court to review and Petitioners' petition for writ of certiorari is due to be denied.

Petitioners' retroactivity/due process argument is based on the legal and factual premises that representations in the form of opinions were not actionable under

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[3] Under certain circumstances, the Eleventh Circuit Court of Appeals will affirm a judgment of a district court *without opinion*. Eleventh Circuit Rule 36-1, reads, in part, as follows:

> When the court determines that any of the following circumstances exist:
>
> * * *
>
> (b) the evidence in support of the verdict is sufficient;
>
> * * *
>
> (e) judgment has been entered without an error of law;
>
> *and an opinion would have no precedential value,* the judgment or order may be affirmed or enforced without opinion.

11th Cir. R. 36-1 (emphasis added).

any circumstances in Alabama in 1985, and that Petitioners were unaware in 1985 that the conduct alleged (and proved) by the Respondents could subject the Petitioners to liability for fraud and punitive damages. These premises are unsupported and incorrect.

Alabama courts have held for more than 100 years that a representation in the form of an opinion can support a claim for fraud in certain circumstances. Contrary to Petitioners' assertions, the 1988 *Reynolds* decision was not the first Alabama decision which permitted a fraud claim to be based on an opinion. The *Reynolds* decision simply applied a well-recognized exception to the general rule against allowing a fraud claim to be based on an opinion.

Additionally, it is clear that Petitioners had actual and constructive knowledge, in 1985 when they dealt with Respondents, that their conduct could subject them to liability for compensatory and punitive damages. The jury found Petitioners guilty of intentional, deceitful and fraudulent misconduct. Petitioners presented no evidence whatsoever that they were unaware of the consequences of this type of misconduct. Moreover, Petitioners' retroactivity/due process argument completely ignores the fact that the jury specifically found that Petitioners were guilty of fraudulent suppression. Fraudulent suppression was undeniably actionable under Alabama law in 1985.

Petitioners' second constitutional challenge is likewise without merit. Petitioners contend that they were denied due process by the lower courts' failure to review the "reasonableness" of the amount of the jury's punitive damages award. As with the first issue, Petitioners failed to raise this issue in the courts below. Most likely, the lower courts failed to review the "reasonableness" of the

punitive damages award because Petitioners never requested it. Consequently, Petitioners waived any argument regarding the reasonableness of the punitive damages award. Moreover, under Alabama law, Petitioners bore the burden of articulating reasons why the jury verdict is excessive, yet Petitioners presented no evidence whatsoever as to why the punitive award was excessive under the facts and circumstances of this case.

This Court's rules provide that "[a] petition for writ of certiorari will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10. The instant petition fails to meet the criteria enumerated in Rule 10. The Eleventh Circuit's decision does not conflict with any decision of a federal court of appeals or any decision of this Court. Indeed, contrary to Petitioners' assertions, the lower courts' decisions are fully consistent with the well-established law in the State of Alabama, as well as other state and federal appellate decisions.

At best, Petitioners seek to have this Court render an "advisory opinion" regarding constitutional issues that do not arise within the context of this case. At worst, Petitioners seek to have this Court address a fact-bound dispute about whether the jury's verdict and punitive damages award is supported by the record. In any event, Petitioners failed to preserve either of their constitutional arguments for review, and Petitioners have failed to demonstrate that *this case* presents any issue which would warrant review by this Court.

REASONS FOR DENYING THE PETITION

I. RETROACTIVITY/DUE PROCESS ARGUMENT

A. Petitioners Failed to Preserve Their Retroactivity/Due Process Argument

Petitioners expressly concede that they raised their retroactivity challenge for the first time on appeal to the Eleventh Circuit. [Pet. for Cert. at p.5.] The trial court had no opportunity to consider or rule on this issue. Consequently, the Eleventh Circuit was under no obligation to consider this issue and, from aught that appears from its "no opinion" affirmance, the court did not consider it. As a result, the record has not been properly developed for this Court to consider this issue. For this reason alone, this Court need not consider Petitioners' retroactivity argument. *Kentucky v. Stincer*, 482 U.S. 730, 747 n. 22 (1987); *see also Patrick v. Burget*, 486 U.S. 94, 99 n. 5 (1988) ("This Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court."); *Bankers Life and Casualty v. Crenshaw*, 486 U.S. 71, 79 (1988) ("[T]he policies that animate the 'not pressed or passed upon below' rule . . . [include] a constellation of practical considerations, chief among which is our own need for a properly developed record on appeal.").

Petitioners contend that the "earliest opportunity" they had to raise their retroactivity/due process argument was before the Eleventh Circuit Court of Appeals. [Pet. for Cert. at pp. 4-5.] However, Petitioners' assertion that they could not have raised their retroactivity/due process argument in the trial court is based on an irrational interpretation of Alabama case law. Petitioners' retroactivity argument is based on Petitioners' suggestion

that a case decided by the Alabama Supreme Court in 1988 [*Reynolds v. Mitchell*, 529 So.2d 227 (Ala. 1988)] created a new cause of action in Alabama. Petitioners allege that in *Reynolds* the court "first suggested that a fraud claim could be based on an opinion." [Pet. for Cert. at p.8.] According to Petitioners, under no circumstances prior to the *Reynolds* decision, could a litigant in Alabama have based a fraud claim on a statement of opinion. Building on this erroneous premise, Petitioners contend that this "new cause of action" was applied retroactively at trial in 1990 to impose punitive damages against them for their 1985 conduct. [Pet. for Cert. at p. 7-8.][4]

However, even if the 1988 *Reynolds* decision had created a new cause of action as Petitioners suggest, then Petitioners' retroactivity/due process argument should have been raised during the July 1990 trial of this matter. Petitioners were fully aware of the *Reynolds* decision before the trial of this case[5], but Petitioners never raised this issue to the trial court. Petitioners now contend that they raised this issue at the "earliest opportunity" before the Eleventh Circuit.

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[4] As discussed in more detail *infra*, Petitioners simply misstate Alabama law and the holding in *Reynolds*. The *Reynolds* case did not change the law in Alabama. The Alabama Supreme Court in *Reynolds* did not state or indicate in any way that the court was changing the law or creating a new cause of action, as Petitioners suggest. The law in Alabama has always been, and it is now, that while generally an action for fraud may not be based on a statement of an opinion, there are circumstances under which a representation in the form of an opinion is actionable under Alabama law.

[5] Respondents cited and relied upon the *Reynolds* decision in opposing the summary judgment motion filed by Petitioners in early 1989.

To excuse their failure to raise this issue in the trial court, Petitioners argue that the Alabama Supreme Court, after supposedly changing the law in the 1988 *Reynolds* case, promptly reversed *Reynolds* in the December, 1989 case of *Keller v. Security Federal Savings & Loan Ass'n*, 555 So. 2d 151 (Ala. 1989). Petitioners argue that *Keller* "reinstated" the rule that under no circumstances could a fraud claim be predicated on a representation in the form of an opinion. According to the Petitioners, the *Keller* case was the controlling precedent at the time of the July 1990 trial of this case, and thus there was no retroactivity argument to be made by Petitioners at the time of trial. According to Petitioners, the retroactivity argument became ripe only after the Alabama Supreme Court supposedly overruled *Keller* in the September 1990 cases of *Rodopoulos v. Sam Piki Enterprises, Inc.*, 570 So.2d 661 (Ala. 1990) and *Fraser v. Reynolds*, 588 So.2d 442 (Ala. 1990), wherein, Petitioners contend, the Alabama Supreme Court reinstated the "new law" supposedly created in *Reynolds*.

However, Petitioners' interpretation of the Alabama Supreme Court's intentions in the above-referenced cases is nonsensical. The supreme court in *Keller* made no mention of overruling *Reynolds* or any other decision. The court in *Keller* simply stated the general rule that fraud may not be predicated on an opinion. *Keller*, 555 So.2d at 155.[6] Likewise, the supreme court in *Fraser* and

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[6] Petitioners contend that the Alabama Supreme Court's failure in *Keller* to recite any and all applicable exceptions to the general rule amounted to an implicit overruling of any and all such exceptions. Petitioners' argument is disingenuous at best. If Petitioners' reasoning were correct, any time a court states a bare principle of law without reciting the attendant litany of

Rodopoulos simply stated the exception to the general rule, and the court in no way stated an intent to overrule *Keller* or the general rule against allowing fraud to be based on an opinion. *See Rodopoulos*, 570 So.2d at 663-64. *See also Fraser*, 588 So.2d at 445-46 (The trial court's jury instruction "told the jury . . . everything it needed to know in this case as to when a statement of opinion can constitute actionable fraud.") Nevertheless, Petitioners' argue that the Alabama Supreme Court continues to "silently" reverse itself back-and-forth on this issue, and that every time the Alabama Supreme Court recites the general rule without mentioning the exceptions to the rule, the general rule is overruled, and vice versa.[7]

Petitioners' unreasonable interpretation of the Alabama Supreme Court's intentions in the above-referenced

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hundreds of years of qualifications, exceptions and refinements, the same would be implicitly overruled. Such reasoning is without support or merit.

[7] Interestingly, Petitioners argued throughout the course of this case (prior to the appeal to the Eleventh Circuit) that the *Reynolds* decision did *not* represent a change in Alabama law. In May, 1989 (six months *before* the *Keller* decision), Petitioners specifically argued that the Alabama Supreme Court had not created a "new cause of action" in *Reynolds*, stating instead:

> "*Reynolds* does not purport to override the longstanding rule that claims for fraud normally must be predicated on representations pertaining to *existing* material facts; indeed, the Court specifically reiterates this general rule."

[Petitioners' reply brief in support of Petitioners' Motion for Summary Judgment, p. 7] It was not until Petitioners concocted their retroactivity/due process argument on appeal to the Eleventh Circuit that the Petitioners argued that the *Reynolds* decision had changed the law in Alabama.

cases is designed to (but does not) explain why Petitioners did not raise the retroactivity/due process issue before the trial court. The Eleventh Circuit likely rejected Petitioners' claim that the retroactivity/due process argument was timely raised,[8] as should this Court. Accordingly, the Court should decline review on that basis alone.

B. Petitioners Have Not Suffered a Retroactive Imposition of Punitive Damages

Even if Petitioners had preserved their retroactivity/due process argument, there is no basis in fact or law to entitle Petitioners to present such an argument in this case. Petitioners' retroactivity argument rests on the following premises:

(1) fraudulent representations in the form of an opinion were not actionable under any circumstances in Alabama in 1985 at the time the fraudulent statements were made,

(2) the jury verdict against Petitioners was based *solely* on the Plaintiff's claim for misrepresentation of opinion, and

(3) Petitioners were unaware in 1985 that their conduct could subject them to liability for fraud and punitive damages.

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[8] The Eleventh Circuit specifically requested that the parties submit briefs addressing whether Petitioners timely raised their retroactivity/due process argument. The Eleventh Circuit's "no-opinion" affirmance and summary denial of Petitioners' suggestion for rehearing in banc demonstrates that the court either determined that the Petitioners had not timely raised the retroactivity argument or that the argument was without merit, or both.

As shown below, each of these premises is unsupported and incorrect.

1. Intentionally false opinions have been actionable in Alabama for over a century.

Respondents have never disputed (and do not now) the general rule in Alabama that an action for fraud may not be based on a statement of an opinion. However, the Alabama Supreme Court has recognized exceptions to this general rule for as long as the general rule has existed. In the 1884 case of *Montgomery Southern Railway Co. v. Matthews*, 77 Ala. 357 (1884), the Alabama Supreme Court addressed the issue of whether the following representation could support a claim for fraud:

> That the said railroad, for stock in which the said note was given, *would run near* [defendant's] land, within one to two miles thereof, substantially along the 18th range line, and *would be built* within two years from the date of said note. . . .

Id. at 359 (emphasis added). The railroad asserted that the representation was mere opinion and therefore could not support a claim of fraud. *Id.* at 359-60, 366. Rejecting the railroad's argument, the Alabama Supreme Court held:

> An opinion expressed, even if not realized, cannot, without more, become a fraudulent representation. [Citation omitted.] If, however, such opinion is falsely expressed, with intent to deceive, and does deceive, this constitutes such opinion or representation a false statement of fact, and vitiates a contract thereby procured unless the representation relates to a matter equally open to both parties.
>
> * * *

> If . . . the representation be made as a matter of opinion only, then, to obtain any relief, the purchaser must show that the representation was made knowing its falsehood. Less than an intentional deception, in such conditions, gives no right of action.

Id. at 364-65, 366. Cases decided subsequent to *Matthews* confirm that this longstanding exception to the general rule has existed in Alabama since before the turn of the century. *See, e.g., Griel v. Lomax*, 89 Ala. 420, 426, 6 So. 741 (1889) ("If the alleged representation is construed as an opinion, to be fraudulent, it must be shown to be knowingly false, made with intent to deceive, and to have been accepted and relied on by the plaintiffs as true."); *Bradfield v. Elyton Land Co.*, 93 Ala. 527, 529, 8 So. 383 (1890) ("An opinion 'to be the basis of a legal right in any case, must be knowingly false, and uttered with intent to deceive.' ").

In the 1938 case of *Shepherd v. Kendrick*, 236 Ala. 289, 181 So. 782 (1938), the Alabama Supreme Court explained the rationale for allowing an opinion to serve as the basis for a fraud claim:

> 'It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. * * * If the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of material fact, for he impliedly states that he knows facts which justify his opinion.'

Shepherd, 236 Ala. at 293 (quoting *Kefuss v. Whitley*, 220 Mich. 67, 189 N.W. 76 [which in turn quoted from the English common law decision of Lord Bowen in *Smith v. Land & House Property Corp.*, L.R., 28 Ch. Div. 15]). The rationale espoused in *Shepherd* reconciles the idea of

allowing recovery in fraud based on an opinion with the longstanding requirement that a fraud claim be based on a statement of fact. Statements of opinion which fall within the ambit of the exception stated in *Shepherd*, in effect, become statements of fact and therefore do not violate the requirement that fraud must be based on a statement of existing fact. *See Randell v. Banzhoff*, 375 So. 2d 445, 448 (Ala. 1979) ("In the instant case, any 'opinions' of appellant in this regard were reasonably treated by appellee as existing facts."); *Tillis v. Smith Sons Lumber Co.*, 188 Ala. 122, 134, 65 So. 1015 (1914) ("Under such circumstances the affirmation of a definite opinion as to value becomes an affirmation of fact, that is, of *the fact of a bona fide opinion*; and if it is falsely and fraudulently made 'to mislead or cheat another, to abuse his confidence, or to blind his judgment, it is in law and morals as reprehensible as if any other fact were affirmed for the like purpose.' ") (emphasis added).

The court in *Shepherd* held that the defendant's representation about the permanency of the water supply on the land the defendant sold to plaintiff, though opinion, could amount to actionable fraud since the facts regarding the water supply were not equally known to both sides, and the opinion involved the implied statement that the defendant knew facts which justified his opinion. *Id. See also Ringer v. First National Bank*, 291 Ala. 364, 369, 281 So. 2d 261 (1973) (A bank's opinion as to the financial stability and dependability of third persons could serve as the basis of a fraud claim.); *Scholz Homes, Inc. v. Hooper*, 287 Ala. 628, 632-33, 254 So. 2d 328 (1971) (Opinion as to the projected cost of a house to be built in the future could serve as the basis of a fraud claim.); *Stephens v. Hill*, 249 Ala. 299, 301, 31 So. 2d 136 (1947) ("Here the facts

were not equally well known to both sides. Appellee did not know the land, but the vendors knew it, and the statement as to the amount of timber on the land and the amount of cultivatable land on the farm involved a statement of fact, for the vendors impliedly stated they knew facts which justified their opinion.").

The Alabama Supreme Court's decision in *Reynolds v. Mitchell*, 529 So. 2d 227 (Ala. 1988), is consistent with this well-established line of authority. Citing its 1938 decision in *Shepherd*, the court stated:

> The representations that the apartments would be financially successful could be considered simply statements of opinion. Normally, the courts will not allow a statement of opinion to be a basis on which to predicate a claim of fraud. *However, if there is proof of actual fraudulent intent at the time the representation is made and the person succeeds in the deception and injury results, an action for fraud may be predicated on such a representation, notwithstanding the opinion nature of the representation.*
>
> * * *
>
> In certain situations a person may reasonably rely on the representation of an opinion. For instance, where the facts are not equally known to both sides, a statement of opinion by the one who knows the facts better, often involves a statement of material fact that justifies his opinion. . . .

Id. at 231 (emphasis added).

The trial court's instructions to the jury essentially mirror the language employed by the Alabama Supreme Court in *Shepherd* and *Reynolds* to articulate the circumstances in which a fraud claim can be predicated on an

opinion.[9] Thus, contrary to Petitioners' contentions, the trial court did not retroactively apply a new rule of law in this case.

2. The jury verdict was not based solely on claims for misrepresentation of opinion.

At trial, Respondents asserted two additional fraud theories, independent of their claim based on misrepresentation of an opinion. First, the jury specifically returned a verdict against Petitioners on a fraudulent *suppression* claim. [Pet. for Cert. App. at 5a.] The fraudulent suppression claim, standing alone, supports the jury's verdict against the Petitioners. Petitioners' retroactivity/due process argument disregards the jury's finding of liability on the fraudulent suppression claim. Petitioners have not argued (and cannot successfully argue) that fraudulent suppression is a new or expanded tort created by the Alabama Supreme Court since 1985.

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[9] The trial court's charge to the jury included the following instruction:

> In certain situations a person may justifiably rely on the representation of an opinion. For instance, where the facts are not equally known to both sides, a statement of opinion by the one who knows the facts better, often involves a statement of material fact that justifies his opinion. Therefore, in such a situation, an action for fraud may be based on an opinion, depending on whether the reliance on the representation of the opinion is justifiable.
>
> If it's been established by a preponderance of the evidence that the defendants made representations of opinions with the intent to deceive . . . and the deception was successful and the plaintiffs suffered injuries as a proximate result, then the defendants in such event would be guilty of legal fraud. (App. at 10a-11a.)

Second, Respondents' pursued (and proved) a claim against Petitioners for misrepresentation of an *existing* fact. One of the Respondents, Doyle Kitchens, testified during trial (and during his deposition) that Petitioner Bartliff represented to him that the average annual sales of Arby's restaurants ranged between $750,000.00 and $1,000,000.00. (App. at 4a.) The undisputed testimony at trial established that the average annual sales of Arby's restaurants during the relevant time periods was between $500,000.00 and $600,000.00. (App. at 4a.) Petitioners cannot deny that a misrepresentation concerning the *actual* annual sales of Arby's restaurants was actionable in Alabama in 1985. For this reason, too, Petitioners' retroactivity/due process argument is without merit.

3. Petitioners knew in 1985 that their actions were unlawful and could subject them to liability.

Petitioners argue that they were unaware in 1985 that the conduct alleged (and proved) by Respondents could subject them to liability for fraud and punitive damages. Specifically, Petitioners contend that they were not aware that they were engaging in wrongful conduct (1) when they projected that the Respondents' restaurant would generate over $1 million in annual sales, even though the average annual sales for Arby's restaurants in the southeast region was only about $500,000.00 (App. at 1a-2a, 4a-6a); (2) when they projected annual net profit percentages of 10 to 18% even though Bartliff acknowledged at trial that he had no basis for making such projections (App. at 1a, 8a); (3) when they misrepresented the average annual sales generated by Arby's restaurants (App. at 4a); (4) when they told the Respondents about specific

successful Arby's restaurants while failing to disclose the numerous failures of Arby's restaurants owned by individual operators like the Respondents (App. at 1a-3a); and (5) when they failed to disclose that an operator such as the Respondents had less than a 1% chance of generating one million dollars in annual sales. (App. at 6a-8a.)

Petitioners present the facts as though they were simply making "honest" guesses or projections to the Respondents. However, as the jury found, Petitioners were guilty of *intentional* deceit and fraud. The evidence at trial overwhelmingly established that Petitioners deliberately lied to the Respondents (and other Arby's franchisees) and provided the Respondents with blatantly false financial information and projections.[10]

Given the intentional, deceitful nature of their conduct, Petitioners' assertion that they had no notice that their conduct could subject them to liability for fraud and punitive damages is not credible. In any event, there is not one iota of evidence – documentary, testimonial, or otherwise – to support Petitioners' contention that they were ignorant of the wrongfulness of their conduct. Indeed, their own testimony at trial belies such an assertion.[11]

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[10] Pursuant to the trial court's charge, the jury found that Respondents satisfied a heightened standard of proof – *clear and convincing evidence* – with respect to the punitive damages claim. (App. at 10a.)

[11] Petitioners acknowledged at trial that they were aware in 1985 that FTC regulations prohibited franchisors from giving oral projections of earnings and sales to prospective franchisees. (App. at 8a-10a.)

Moreover, Petitioners do not contend they were unaware in 1985 that they could be held liable for compensatory and punitive damages for fraudulent suppression and misrepresentation of existing fact.[12] Accordingly, Petitioners have no basis in fact or law for complaining that they had no "notice" in 1985 that their conduct was actionable. Petitioners' due process argument is wholly without foundation or merit.

To summarize, in order to reach Petitioners' retroactivity/due process argument, this Court would have to find:

(1) that the *Reynolds* decision created "new law" or a "new cause of action",

(2) that the so-called "new cause of action" was the sole basis of Petitioners' liability for punitive damages,

(3) that Petitioners were unaware prior to *Reynolds* that their conduct could subject them to liability for fraud and punitive damages, and

(4) that Petitioners timely raised this issue in the courts below.

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[12] Petitioners cannot (and do not) dispute that "fraudulent suppression" and "misrepresentation of existing fact" were well-recognized causes of action in Alabama in 1985. Furthermore, although Petitioners dispute that they had constructive knowledge in 1985 that representations in the form of an opinion could serve as the predicate of fraud claim in Alabama, Petitioners could have referred to the American Jurisprudence legal encyclopedia which states: "It is usually held . . . and it is the position taken by the courts in the recent decisions, that the expression of an opinion not in reality entertained may constitute actionable fraud where it is stated falsely and with intent to deceive . . . . " 37 Am. Jur. 2d, *Fraud and Deceit* § 53 (1968) (citing the Alabama case of *Montgomery S.R. Co. v. Matthews*, 77 Ala. 357 (1884)).

However, not one of the above statements is correct. Consequently, there is no factual or legal predicate upon which Petitioners may assert their retroactivity/due process argument.[13]

II. POST-VERDICT REVIEW OF PUNITIVE DAMAGES AWARD

A. Petitioners Failed to Request a Post-Verdict Review of the "Reasonableness" of the Punitive Damages Award

In their petition for writ of certiorari, Petitioners assert *for the first time at any stage of these proceedings* the argument that the punitive damages award was excessive and that the lower courts inadequately reviewed the reasonableness of the punitive damages award. Petitioners never raised this issue in the trial court.[14] Indeed, Petitioners did not even file a motion for remittitur.

The *only* due process argument ever asserted by Petitioners in the District Court appeared in their motion for

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[13] Additionally, even if Petitioners' retroactivity/due process argument could have been made in this case, there has been no *ex post facto* violation with respect to Petitioners' situation. Petitioners cannot show they were "disadvantaged" by the so-called "new law" in *Reynolds*, since the punitive damages the jury could have awarded as a result of Petitioners' misrepresentation of opinion were no more onerous than the punitive damages the jury could have awarded with respect to the fraudulent suppression claim. *See Miller v. Florida*, 482 U.S. 423, 429 (1987).

[14] The only excessiveness issue raised by Petitioners related to the compensatory award. Petitioners vigorously asserted that the jury unjustifiably awarded $20,750 to Pauline Kitchens, arguing that Mrs. Kitchens' failure to testify precluded as a matter of law the jury's finding of Mrs. Kitchens' reliance and damage.

judgment notwithstanding the verdict and new trial, and read as follows:

> The award of punitive damages in this case is unconstitutional in that it is a violation of due process guaranteed under the Fifth and Fourteenth Amendments to the Constitution of the United States and under Article I and VI of the Constitution of Alabama of 1901, upon the following grounds separately and severally:
>
> a. The trial procedures and jury instructions fail to provide specific standards for the imposition of an award of punitive damages;
>
> b. The trial procedures and jury instructions fail to provide specific standards for the amount of any award of punitive damages;
>
> c. The trial procedures and jury instructions fail to provide a limit on the amount of the award;
>
> d. The trial procedures and jury instructions permitted the award of punitive damages solely upon the grounds of respondent [sic] superior;
>
> e. The trial procedures and jury instructions fail to provide a clear standard for appellate review of the award of punitive damages;
>
> f. The trial procedures and jury instructions allowed imposition of punishment on a reduced standard of proof.

Regardless of how Petitioners would now like to characterize the above-quoted language, these allegations constitute nothing more than the boilerplate "inadequate guidelines" arguments addressed by this Court in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991). At the

time Petitioners filed their post-trial motion, the *Haslip* case had not yet been decided, and it is clear that Petitioners simply were attempting to preserve their "*Haslip*" arguments in the event this Court found merit to such arguments.

After the District Court denied Petitioners' post-trial motion, this Court decided the *Haslip* case. Consequently, in their appeal to the Eleventh Circuit, Petitioners did not raise any *Haslip* arguments. Instead, this Court having rejected the *Haslip* arguments (at least with respect to Alabama law), Petitioners asserted for the first time their retroactivity/due process argument. Petitioners did not in any manner argue to the Eleventh Circuit that the punitive damages award was unconstitutionally excessive, or that the trial court erred by failing to review *sua sponte* the reasonableness of the punitive damages award.

Petitioners now contend that their due process challenge to the post-verdict review of the punitive award is a "mere enlargement" of their retroactivity/due process argument. Such a contention stretches the truth and logic beyond any reasonable bounds. Petitioners retroactivity/due process argument in no way alerted the Eleventh Circuit that Petitioners were seeking review of the amount of the punitive award, or that Petitioners were seeking review of the trial court's failure to review the reasonableness of the award.[15]

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[15] Even if the *Haslip* arguments could have been deemed sufficient to raise the issue of excessiveness of the punitive award to the trial court, Petitioners cannot seriously or truthfully contend that they raised the issue of excessiveness of the punitive award (or the trial court's review of the punitive award) to the Eleventh Circuit.

In *Banker's Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988), this Court held that "a vague appeal to constitutional principles" does not preserve specific constitutional claims. In *Crenshaw*, the Court determined that an appellant who complained in the court below that the punitive damages award "was clearly excessive . . . and violates constitutional principles[,]" failed to preserve for appeal a due process claim based on the alleged excessiveness of the punitive damages award. *Id.* (quoting *Taylor v. Illinois*, 484 U.S. 400, 407 n. 9 (1988) ("A generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights . . . ").

Likewise, Petitioners' excessiveness argument is by no means a "mere enlargement" of the very specific retroactivity/due process argument asserted by Petitioners in their appeal to the Eleventh Circuit. The Court in *Crenshaw* stated:

> Similarly, appellant's challenges in this Court to the size of the punitive damages award in no way qualify as 'mere enlargements' of claims made before the Mississippi Supreme Court. Under the mere enlargement doctrine, '[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed.' *Dewey v. Des Moines*, 173 U.S. 193, 198, 43 L.Ed. 665, 19 S.Ct. 379 (1899) [citation omitted]. Dewey makes clear, however, that the federal question must be brought to the attention of the court below in some manner. 'A claim or [illegible] which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it.'

Crenshaw, 486 U.S. at 78 n. 2. There is no connection between Petitioners' retroactivity/due process argument and their excessiveness/due process argument, and Petitioners have no basis for relying on the "mere enlargement" doctrine to preserve their excessiveness/due process argument. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 220 n. 2 (1983).[16]

Petitioners have long since waived any arguments regarding the alleged excessiveness of or inadequate review of the punitive damages award. Accordingly, certiorari is due to be denied on this issue.[17]

B. Petitioners Presented no Evidence that the Punitive Damages Award was Excessive

Under Alabama law, a defendant bears the burden of proving that a jury's verdict is excessive. *McDowell v. Key*, 557 So. 2d 1243, 1249 (Ala. 1990). It is not sufficient for a

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[16] In support of their "mere enlargement" contention, Petitioners cite Justice White's concurrence in *Illinois v. Gates*, in which Justice White criticized the majority's strict adherence to the "not pressed or passed upon below" rule. However, Justice White stated in that same concurrence that to properly preserve an issue for appeal, the issue must be brought to the attention of the lower court "with fair precision." *Illinois*, 462 U.S. at 247. Petitioners cannot credibly argue that their excessiveness/due process argument was brought to the attention of the Eleventh Circuit with fair precision *or any precision*.

[17] Petitioners do not contend that this is an "exceptional case" and that the Court should consider overlooking Petitioners' failure to preserve their constitutional issues. Apparently, not even the resourceful Petitioners could devise a reason why this Court should deviate from its normal practice of refusing to consider issues which have not been properly raised below. Consequently, Petitioners must steadfastly assert that they preserved their constitutional arguments.

defendant to simply file a motion for new trial and/or remittitur and claim that the amount of the jury's verdict is, *ipso facto*, excessive. Instead, the defendant must *prove* that the verdict is excessive. To do this, the defendant must submit *evidence* as to certain factors[18] it wishes the trial court to consider in evaluating the size of the jury's verdict. *Id.* In the absence of such evidence, the trial court will not be in a position to evaluate the size of the jury's verdict.

In the instant case, Petitioners failed to present any evidence at any time that the punitive damages award was excessive. Petitioners never requested the trial court to hold a hearing regarding the reasonableness of the punitive damages award. Petitioners never complained to the Eleventh Circuit that the punitive damages award was excessive or that the trial court failed to review the reasonableness of the punitive damages award. Now, for the first time, Petitioners seek review of the reasonableness of the punitive damages award, and ask this Court to remand the case for that purpose.

However, the consequence under Alabama law of Petitioners' failure to submit any evidence of the alleged excessiveness of the punitive damages award is dramatically illustrated by the recent decision in *Fuller v. Preferred*

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[18] The factors which a trial court may consider in determining whether the jury award of punitive damages is excessive include: (1) the relationship between the punitive award and the harm from defendant's conduct; (2) the degree of reprehensibility of the defendant's conduct; (3) the pecuniary gain by the defendant through the wrongful conduct; (4) the financial position of the defendant; (5) the costs of litigation; and (6) criminal sanctions and/or other civil awards levied against the defendant for the same conduct. *Green Oil Co. v. Hornsby*, 539 So.2d 218, 223 (Ala. 1989).

Risk Life Ins. Co., 577 So. 2d 878 (Ala. 1991). In *Fuller*, the court, reinstating a $1,000,000 fraud verdict, held:

> In this case, the trial judge failed to make the finding required by *Hammond v. City of Gadsden*, supra, and *Green Oil Co. v. Hornsby*, supra. Does this require a remand as argued by Preferred Risk? We hold that it does not in the posture of this case. When the jury returned its verdict, Preferred Risk filed its motion for new trial, a judgment notwithstanding the verdict, or a remittitur. Preferred Risk argued only that, because the verdict exceeded the amount claimed in the complaint, it was due to be reduced. It did not offer any evidence in support of its contention that the verdict was excessive, and instead argued that it was entitled to a reduction of the verdict as a matter of law.
>
> * * *
>
> This Court observed in *Industrial Chemical & Fiberglass Corp. v. Chandler*, 547 So. 2d 812 (Ala. 1988), as follows:
>
> > 'Nothing prevents the defendant, at a hearing on a motion for new trial based on an allegedly flawed verdict, from presenting evidence to prove one or more of the above considerations [Hammond factors], and, by doing so, to guarantee that his rights to due process of law in regard to the jury's award is protected. In sum, "fundamental fairness" requires that defendant be given the opportunity to present proof to the trial court during post-judgment review of the verdict that the award is unreasonable, disproportionate, or economically destructive . . . '
>
> 547 So. 2d at 838. Preferred Risk had this opportunity and elected to present no evidence at all.

* * *

> The record is devoid of any evidence that will justify interference with the verdict under the criteria established in *Hammond, Green Oil Co.* and their progeny.

Id. at 885-86.

The Alabama Supreme Court followed its *Fuller* holding in *Associates Financial Services Co. of Alabama, Inc. v. Barbour*, 592 So. 2d 191 (Ala. 1991):

> Like the defendant in *Fuller*, supra, Associates was given the opportunity to present evidence concerning the factors identified by this court in *Hammond* and *Green Oil Co.*, yet Associates consciously elected not to do so. The trial court was presented no evidence concerning Associates' financial position, the availability of liability insurance, the existence of other civil litigation, criminal sanctions, or profit derived from real estate transactions. In the absence of such evidence, as noted by the trial court, 'the court is in no position to evaluate or consider these factors.' *McDowell v. Key*, 557 So. 2d 1243, 1246 (Ala. 1990).
>
> * * *
>
> Under these circumstances, the trial court correctly refused to remit the jury's verdicts.

Id. at 198-99. In short, Petitioners bore the burden of presenting evidence that the jury's verdict was excessive. Petitioners failed to present any such evidence to the trial court, despite ample opportunity to do so. Further, Petitioners made no complaint to the Eleventh Circuit that they did not have an opportunity to present evidence of the alleged excessiveness of the punitive award. Indeed, Petitioners' failure to present any evidence of alleged excessiveness underscores that the punitive award was

not excessive.[19] In any event, by failing to present evidence (or to attempt to present evidence) regarding the alleged excessiveness of the punitive award, Petitioners waived any arguments regarding the alleged excessiveness of the punitive award and the post-verdict review of that award.

C. The Lack of a Post-Verdict Review of the "Reasonableness" of the Punitive Damages Award Does Not Warrant Review By This Court

Even if Petitioners had preserved the excessiveness/due process issue for review, it does not warrant review by this Court. Petitioners attempt to create an issue worthy of certiorari by suggesting that lower federal courts are confused about how or whether to apply state-law procedures for post-verdict review of punitive damages awards. [Pet. for Cert. at p.17.] However, this is not a case where the trial or appellate court exhibited any confusion about what standards to apply because no review of the reasonableness of the punitive damages award was requested or conducted. In the absence of such review, this Court would be issuing an advisory opinion to address an alleged confusion regarding federal court review of punitive damages awards.

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[19] A simple comparison of the punitive award ($1,500,000) and the compensatory award ($383,000) demonstrates that the punitive award was not out-of-line, particularly in light of the jury's finding that Petitioners *intentionally* defrauded the Respondents (as well as numerous other former Arby's franchisees).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Excerpts from Transcript of Trial Proceedings

[Testimony of Morgan Kitchens]

[282] Q. During the time of your meeting with him and riding around with him, did y'all discuss the issues of, you know, 'how much money can we make on this thing?'

A. Yes, I did. And he said that I could expect a net profit of 10 to 18 percent of sales. And I also asked him various figures relating to food costs and paper costs and he was very informative about that.

* * *

[284] Q. And what did he tell you the estimated sales would be for the site that y'all discussed, based on his knowledge with Arby's and his expertise?

A. At least a million dollars.

* * *

[286] Q. Did he tell you that the sales figure of a million dollars one time, or was it something that was mentioned more than one time?

A. He repeatedly said that figure to us.

Q. Did you all question him as far as, "Well, how come you think we'll make a million dollars at this location?"

A. He really liked the area because he said that Burger King was located next to it, there was a Delchamps Shopping Center, and said that we would be the first fast-food that you'd approach into town, and basically he felt very [287] comfortable with that figure, because Burger King was

doing such a strong business at the time and just his knowledge of what the Arby's stores make in his area.

Q. Did he indicate that he had knowledge of what Arby's stores made?

A. Yes, he did. And I had asked him and he had mentioned that – talked about the Deuprees in Sylacauga. He said that their store was about seven hundred and fifty thousand to eight hundred thousand dollars.

Q. Now, is that the same Chuck Deupree who just came here and testified that they really made about three hundred thousand dollars a year, in one year, or maybe four hundred?

A. Yes, sir.

Q. He told you back then they were making how much?

A. Seven hundred and fifty thousand or more; to eight hundred thousand.

* * *

[300] Q. What number did you put in there [Site Acceptance Request], based on your conversation with Arby's that the projected annual sales for that site would be?

A. They said –

Q. What did you write down there?

A. A million dollars plus.

Q. It says a million plus?

[301] A. Yes, sir.

Q. Any where did you get that figure?

A. From Arby's.

Q. And is this a document, please, sir, that was sent to FFCA, or was this sent on May 31st, back up to Atlanta to Arby's?

A. Sent back to Atlanta to Arby's.

Q. Did anybody from Arby's at that time call you and say, "Hey, wait a minute, man, you've got a projection of a million dollars on this little store in Gulf Shores. What are you thinking of?" That there's no way that you would make a million dollars or even close to it at that store?

A. No, sir, they did not.

* * *

[Testimony of Doyle Kitchens]

[867] Q. But did you rely on Mr. Bartliff's knowledge and expertise in dealing with Arby's in order to make those projections for you?

A. Totally.

Q. And did he tell you – this is the issue in this case – Did he tell you, looking you in the eye, that an Arby's at that location that you showed him would make, in his opinion, based on what he knew about the company sales, in excess of a million dollars?

A. Yes, sir. More than one time.

Q. Did you rely on it?

A. Yes, sir, I did.

Q. Did he tell you that an average Arby's made 10 to 18 percent net profit?

A. Yes, he did.

Q. Did you rely on it?

A. Yes, I did.

Q. Did he tell you that an average store in Arby's made $750,000 to a million dollars a year in sales?

A. Yes, he did.

* * *

[868] Q. Have you learned later that the average Arby's store really makes, as they told us in their sworn interrogatory answers in this case, average sales of about five hundred to six hundred thousand dollars?

A. Yes, sir. I learned that in some of the depositions or later.

[Testimony of Douglas Southard]

[363] A. As part of our work, we were asked to analyze some data provided by Arby's with respect to the sales revenues of their licensees in Alabama, Florida, Georgia, and Mississippi. That data was provided from 1984 through 1987.

* * *

[368] Q. What was the average [annual sales] of a small franchisee in 1984?

A. Four hundred thirty-six thousand dollars.

* * *

Q. I'm going to put a K right there for Kitchens, because that would be the group they'd be in; right?

A. That's the group they're in, yes.

* * *

[370] Q. All right. And if you exclude those stores that make less than two hundred thousand dollars a year in gross sales, what does that do to the average sales over here?

A. For any particular group?

Q. For 1984. I'm sorry. When you exclude those making less than two hundred thousand dollars.

A. Okay. The average for all goes up to about five hundred sixty thousand dollars.

Q. Okay. And what was the average for the Kitchens group, the small franchisee?

A. It goes to four hundred eighty-nine thousand dollars.

* * *

[371] Q. What was the average of all stores based on the data that they gave you, the data that you reviewed in 1985?

A. Five hundred six thousand dollars.

Q. Right here?

A. Yes.

Q. That's the blue one. Okay.

What was average for all small franchisees like the Kitchens in 1985?

A. Four hundred twenty-one thousand.

Q. Now, can you tell me – I think it's in your report somewhere – do you know what the Kitchens' average – not average but what their actual sales were in 1986?

[372] A. Okay.

Q. Their first year of operation, first full year.

A. 1986 calendar year from Arby's or their 1986 fiscal year? Which one? I think I've got both.

Q. All right. Fiscal year.

A. Their fiscal year ended – that actually ends June 1987, which was their first full year, they did four hundred sixty thousand dollars.

Q. Four hundred sixty thousand dollars?

A. That's correct.

* * *

[373] Q. What was average for all small franchisees like the Kitchens in 1986?

A. Four hundred sixty-seven.

* * *

[380] Q. What about in 1985? If you exclude the two hundred thousand dollars and less, what percentage or what probability was it that you'd make a million dollars in sales in 1985, based on this information?

A. It was .57 percent.

Q. A half a percent?

A. Right.

Q. Is that one out of two hundred?

A. Roughly, yeah.

Q. What about in 1986?

A. It's .35 percent.

Q. Which is even worse; right?

A. About one out of three hundred.

Q. And in 1987, we peaked up a little bit to about 1985; is that right?

A. To about a half a percent.

Q. Okay. Again, one out of two hundred?

[381] (Witness nods affirmatively.)

Q. Oh, I meant to ask you this, another thing. Look at, if you will, page – I think it's page 9. I guess it is, isn't it?

A. Yes.

Q. Page 9. And you've broken down the same type calculations into small franchisees, people that have less than seven stores?

A. Right.

Q. Six or less. What was the chance or the probability in 1984 that somebody in the small group like the Kitchens had, based on this information that we got from Arby's, now, of making a million dollars in gross sales?

A. It was about .13 percent.

Q. And what is .13 percent? If .5 percent's one out of two hundred, what's .13 percent?

A. It's about one out of eight hundred.

Q. One out of eight hundred. Okay.

In 1985, what was the chance of somebody with a small franchisee of making a million dollars in gross sales, based on this information by Arby's.

A. About one out of a thousand.

Q. That's .10 percent; right?

A. Right.

[Testimony of Fred Bartliff]

[703] Q. Go to page 93, line 12.

"Did you ever tell the Kitchenses that all or most of Arby's franchise restaurants generate a net profit of between 10 and 18 percent [704] annually?"

A. "No. I did not tell them that. I would have no reason to tell them that."

Q. "Because you don't know whether that's true or untrue?"

A. "I don't have access to the franchisee's P & L's, and I would not have any way to know whether that was true or not."

* * *

[732] Q. All right. You spoke about a Federal Trade Commission regulation. What does it say?

A. Federal Trade Commission is the governing body as to your offering circular that you hand out to prospective franchisees.

They have a section in your offering circular item 19, I believe. That is an earnings claim statement and basically what they're saying is that what you put in your earnings claims statement, if you chose to provide numbers, then you are able to provide the numbers that are in the earnings claim statement. And if you do provide those numbers, then you do need to have [733] backup information to support those numbers. If you chose not to

provide numbers, then you may not tell people numbers.

[Testimony of Karen Shellady]

[788] Q. And you mentioned the FTC. Would you tell the jury what the FTC is?

A. The FTC is the Federal Trade Commission who governs or issues rulings on franchising.

Q. And the FTC is a group by the United States government that issues rules and regulations about what you can tell franchisees and what you can't tell them; right?

A. Yes.

Q. And you told us there were two methods that the FTC says that you can do, if you want to; right?

A. Right.

* * *

[789] Q. So there are two methods. One is tell them and, [790] two, you don't, about profits and sales forecasts and sales figures; right?

A. Yes.

* * *

Q. And if Arby's in Atlanta, Georgia wanted to tell the people what the true average store volume was for the years '84, '85, '86 and '87, if they wanted to tell them, they could do that if they did it in writing under the FTC rules, could they not?

A. Yes.

Q. But Arby's chose not to tell them; right?

A. Well, our franchisees can.

Q. Sure. Well, let's talk about Arby's. Arby's chose in your offering circular –

A. Not to disclose.

Q. – not to tell them that information; right?

A. Yes.

* * *

[791] Q. Okay. . . . the regional franchise managers are told that they can't tell that information about profits and projected sales; right?

A. Yes.

[Trial Court's Charge to the Jury]

[1148] For the plaintiff to be entitled to recover punitive damages, the plaintiff must prove by clear and convincing evidence that a defendant consciously had an intent to deceive.

* * *

[1160] In certain situations a person may justifiably rely on the representation of an opinion. For instance, where the facts are not equally known to both sides, a statement of opinion by the one who knows that facts better, often involves a statement of material fact that justifies his opinion. Therefore, in such a situation, an action for fraud may be based on an opinion, depending on whether the reliance on the representation of the opinion is justifiable.

If it's been established by a preponderance of the evidence that the defendants made representations of opinions with the intent to deceive – now you

have to consider this together with all the instructions, just don't take out one – there also must be an intent to deceive or defraud the [1161] plaintiffs and the deception was successful and the plaintiffs suffered injuries as a proximate result, then the defendants in such event would be guilty of legal fraud.